SUPREME COURT OF THE UNITED STATES.

No. 74.

JAMES PHALEN, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE GENERAL COURT OF VIRGINIA.

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J. & G. S. Gideon, printers.

To the honorable Peter V. Daniel, one of the judges of the Supreme Court of the United States.

The petition of James Phalen respectfully showeth, that the annexed is a copy of the record of the proceedings of the general court of Virginia, reviewing a judgment of the circuit superior court of law of the county of Henrico, for the trial of criminal causes, in a case in which the Commonwealth of Virginia prosecuted your petitioner for an alleged violation of one of the penal laws of Virginia, and in which the said general court affirmed the judgment rendered by the said circuit court against your petitioner. The petition presented by your petitioner to the said general court sets forth the grounds upon which your petitioner sought, and now seeks, relief against the judgment which has been rendered against him, and is a part of the record herewith submitted. Your petitioner therefore contents himself with respectfully referring to the said petition, as showing, that by the decision which has been rendered against him, both he and others (the Alexandria and Fauquier Turnpike Co.) have been deprived of a valuable and vested right and privilege, in violation of the Constitution of the United States. Your petitioner therefore prays that a writ of error to the said judgment of the general court of Virginia may be awarded him, and that the same may be superseded, reversed, and annulled.

JAMES PHALEN.

UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States, to the honorable the judges of the general court of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said general court of Virginia, before you, or some of you, between James Phalen, plaintiff in error, and the Commonwealth of Virginia, defendant in error, a manifest error hath happened, to the great damage of the said James Phalen, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Su-

preme Court, this ninth day of December, in the year of our Lord one thousand eight hundred and forty-two.

HENRY GIBSON,
Clerk U. S. circuit court E. Virginia district.

Allowed by--

State of Georgia, to all to whom these presents shall come:

Whereas, a writ of error has been obtained to take a certain suit or cause pending before the supreme court of appeals of Virginia, between the Commonwealth of Virginia and James Phalen, to the Supreme Court of the United States, and it is necessary that bond and security be given to the Commonwealth of Virginia to secure the payment of costs in case said cause should be decided against the said James Phalen. Now know ye, that I, the said James Phalen, of the city of New York, at the date of these presents in the city of Savannah, and in the State aforesaid, have made, constituted, and appointed, and do hereby make, constitute, and appoint, Thomas B. Bigger, of Richmond, in the State of Virginia, my true and lawful attorney for me, and in my name, and as my act and deed, to execute and deliver any bond or bonds which may be deemed necessary and proper to carry said action or suit before the Supreme Court of the United States, hereby ratifying and confirming the act of my said attorney in the premises as my own deed.

In testimony whereof, I, the said James Phalen, have hereto set my hand and seal, this fifth day of January, A. D. eighteen hundred and forty-three.

JAMES PHALEN. [L. S.]

Signed, sealed, and delivered, at Savannah, in the district of Georgia, in the presence of

JOHN C. NICOLL,
District judge of the United States for the district of Georgia.

Know all men by these presents, that we, James Phalen and Thomas B. Bigger, are held and firmly bound unto James McDowell, Governor or chief magistrate of the Commonwealth of Virginia, in the full and just sum of three hundred dollars, to be paid to the said James McDowell, Governor of the Commonwealth aforesaid, and his successors in office; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this seventh day of January, in the year of our Lord one thousand eight hundred and forty-three.

Whereas, lately, at a general court of Virginia, in a suit depending in said court, between the Commonwealth of Virginia, plaintiff, and the said James Phalen, defendant, judgment was rendered against the said James Phalen, and the said James Phalen as aforesaid having obtained a writ of error, and filed a copy thereof in the clerk's office of the court of the United States, for the fifth circuit and eastern district of

Virginia, to reverse the judgment in the aforesaid suit, and a citation directed to the Commonwealth of Virginia, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of this month, January, 1843.

Now, the condition of the above obligation is such, that if the said James Phalen shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES PHALEN, [L. S.]
By THO. B. BIGGER, *Att'y.*
THO .B. BIGGER. [L. S.]

Sealed and delivered in presence of

HENRY GIBSON,
Clerk U. S. court, for the 5th circuit and eastern district of Virginia.

Approved by—

Pleas at the capitol, in the city of Richmond, before the judges of the general court of Virginia, on Saturday, the second day of July, in the year one thousand eight hundred and forty-two.

Be it remembered, that heretofore, to wit, at a general court of Virginia, held at the capitol aforesaid, on Thursday, the first day of July, in the year 1841, on the petition of James Phalen, a writ of error was awarded him to a judgment of the circuit superior court for Henrico county, and the city of Richmond, rendered against the petitioner on the third day of May, 1841, upon a presentment for a misdemeanor, whereby it was considered by the said circuit superior court that the Commonwealth recover against the said James Phalen a fine of twenty dollars and the costs of the prosecution; which said writ of error was to supersede all farther proceedings on the said judgment, and was to b returnable before the said general court, at the capitol aforesaid, on the first day of the then next term.

The petition of the said James Phalen, mentioned in the foregoing order, and the certificate thereto subjoined, of counsel practising in the said general court, are in the words and figures following, that is to say:

"To the honorable the general court of Virginia:

"The petition of James Phalen respectfully showeth, that in the year , the General Assembly of Virginia, by its act, incorporated the Alexandria and Fauquier Turnpike Company for a period of years. That the persons incorporated proceeded to organize themselves and construct their road according to the said act, and having in the progress of their work contracted heavy debts, in the year 1828 they petitioned the General Assembly of Virginia for authority, by law, to raise the sum of thirty thousand dollars by lottery; and in January, 1829, the General Assembly passed a law conferring the right, without any limitation as to the time within which the lottery should be drawn,

except of course that it should be done during the existence of the corporation. On the 25th day of February, 1834, the legislature passed another law, by which it was declared that no lottery should be drawn in Virginia after the first day of January, 1837, but providing that no contract then existing for drawing a lottery after the first of January, 1837, should be violated, nor any contract which might be made thereafter, under any law of Virginia, for drawing a lottery at any time before the first day of January, 1840. And on the 11th day of March, 1834, the same legislature passed another law, by which it revived the act in favor of the said company, by appointing new commissioners to carry it into effect, and providing for the manner of supplying vacancies thereafter. And on the 19th day of December, in the year 1839, the said commissioners entered into a contract with your petitioner and his partner, Francis Morris, by which the said Phalen & Morris were appointed exclusive managers of the said lottery, to be drawn for the benefit of the said company, until out of the proceeds of the said lottery the said sum of thirty thousand dollars was raised and paid to the said company, in annual payments of fifteen hundred dollars. Under the said contract the said Phalen & Morris established their lottery and advertised the tickets for sale, and the said James Phalen sold one of said tickets at his office in the city of Richmond. For selling the said lottery ticket, the said Phalen was presented by the grand jury in the criminal branch of the circuit superior court of law and chancery for the county of Henrico, and city of Richmond, at the October term, 1840, and at the May term, 1841, a trial was had, and a special verdict rendered, ascertaining the facts above set forth, and submitting the law to the court; and upon that verdict, the court rendered a judgment against your petitioner for a fine of 20 dollars and the costs. All which will more fully appear by the transcript of the record of the said verdict and judgment, which is herewith submitted.

"By the said judgment your petitioner feels much aggrieved, and he is advised the same is erroneous and ought to be reversed, for the following among other errors apparent upon the face of the record:

"1. Because the act of February 25, 1834, does not profess to repeal, and does not repeal, the act of January, 1829, which conferred the right to draw the lottery, and therefore your petitioner had lawful authority to sell the said lottery ticket.

"2. Because the act of the 11th of March, 1834, is to be regarded as re-enacting the law of January, 1829; and being posterior in date to the law of February, 1834, if there be any inconsistency between the two laws, the posterior law must prevail.

"3. Because the right to draw the lottery, conferred by the act of January, 1829, was a valuable franchise and vested right, which it was not competent to the legislature to revoke; and if, therefore, the act of February, 1834, is to be regarded as revoking it, it is unconstitutional and void; and whether it does or does not revoke it, your petitioner should have been acquitted.

"Your petitioner therefore prays that a writ of error may be awarded to the said judgment, and that the same may be reversed and annulled.

JAMES PHALEN."

"We are respectfully of opinion, that the judgment complained of in the annexed petition is erroneous, and ought to be reversed.

JOS. MAYO,
JAMES LYONS,
R. C. STANARD,
Counsel practising in the general court."

The writ of error which issued in pursuance of the order aforesaid awarding the same, and the return made thereon, are in the words and figures following:

"The Commonwealth of Virginia, to the judge of the circuit superior court for Henrico county and the city of Richmond, greeting:

Whereas, in the record and proceedings, and also in the rendition of the judgment in our said court, given on the 3d day of May, 1841, against James Phalen, upon a presentment for a misdemeanor, whereby it was considered by our said court that the Commonwealth recover against the said James Phalen a fine of twenty dollars and the costs of the prosecution, manifest error has happened, to the great damage of the said James Phalen, as by his complaint we have understood—we, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the said James Phalen in this behalf, command you, that the record and proceedings aforesaid, with all things touching the same, under your seal, you distinctly and plainly send to the judges of our general court, at the capitol in the city of Richmond, on the first day of the next term, so that our said judges, the record and proceedings aforesaid being inspected, may farther cause to be done therein what of right, and according to law, ought to be done; and that you cause it to be made known to the sheriff of our said county, that it is our command that from all further proceedings on the judgment aforesaid he altogether supersede; and have then there this writ.

"Witness Nathaniel P. Howard, clerk of our said general court, at the capitol aforesaid, this 3d day of July, 1841, in the 66th year of our foundation.

N. P. HOWARD."

"Pursuant to the within writ, I have certified to the general court a full and complete record of the proceedings in the case within mentioned, and which is hereto annexed.

Given under my hand and seal, this 14th day of January, 1842.

P. N. NICHOLAS. [SEAL.]"

The record sent to the general court, in pursuance of the foregoing writ of error, and referred to in the return made upon the said writ, as annexed thereto, is in the words and figures following, that is to say:

"VIRGINIA:

"Pleas at the City Hall, in the city of Richmond, before the circuit superior court of Henrico county and the said city, held for the trial of criminal causes, on Monday, the third day of May, one thousand eight hundred and forty-one.

"Be it remembered, that heretofore, to wit, at a circuit superior court for the said county and city, held for the trial of criminal causes, at the City Hall aforesaid, the 31st day of October, in the year one thousand eight hundred and forty, the grand jury, to wit, Archibald Pleasants, gent., foreman, William Evans, Andrew Hetherton, Ellis Brown, Samuel Marx, William Rowlett, Archibald Thomas, Jesse Williams, William C. Allen, Samuel S. Saunders, Richard Whitfield, Russel Dudley, George Fisher, James Caskie, James Scott, Hall Neilson, James Bray, Sterling J. Crump, Joseph A. Weed, James Griffin, John A. Lancaster, and Corbin Warwick, gentlemen, appeared according to their adjournment; and the said grand jury were again sent out of court, and after some time returned, and among other presentments made the following:

'VIRGINIA, FOURTH JUDICIAL DISTRICT,
21st judicial circuit, county of Henrico
and city of Richmond, to wit:

'The grand jurors of the Commonwealth of Virginia, in and for the body of the county of Henrico and city of Richmond, duly summoned to attend the circuit superior court of law and chancery, for the county of Henrico and city of Richmond, for the trial of criminal causes, upon their oaths present James Phalen, for this, that he, the said James Phalen, since the first day of January, in the year eighteen hundred and thirty-seven, to wit, on the first day of June, in the year eighteen hundred and forty, at the city aforesaid, and within the jurisdiction aforesaid, unlawfully did sell, and cause to be sold, one certain lottery ticket in a certain lottery to be drawn in this Commonwealth, to wit, in a lottery called Alexandria and Fauquier Turnpike Lottery, and then and there advertised to be drawn at , in the county of , the said lottery not being a lottery authorized to be drawn by any contract made with this Commonwealth, prior to the twenty-fifth day of February, in the year eighteen hundred and thirty-four, or by any contract made since, in pursuance of any law of this Commonwealth, passed prior to the said twenty-fifth day of February, eighteen hundred and thirty-four, contrary to the act of the assembly in that case made and provided. This presentment is made upon testimony of Charles Purcell and R. H. Maury, residents of the city of Richmond, witnesses called upon by the court, and sworn and sent by the court to give evidence to the grand jury.'

And it was ordered, that the said James Phalen be summoned to appear before the said court on the first day of the ensuing term thereof, to be holden for the trial of criminal causes, to answer the presentment aforesaid.

"And at another day, to wit, at a circuit court for the said county of Henrico and city of Richmond, held for the trial of criminal causes at the City Hall aforesaid, on the first day of May, one thousand eight hundred and forty-one, came as well the attorney for the Commonwealth, as the defendant by his attorney; and the said defendant by his said attorney saith, that he is not guilty in manner and form as in the aforesaid presentment against him is alleged, and of this he putteth himself upon the country; and the said attorney for the Commonwealth likewise.

"And now, at this day, to wit, at the same circuit court continued and held at the City Hall aforesaid, on the day and in the year first herein mentioned, to wit, Monday, the third day of May, in the year one thousand eight hundred and forty-one, came as well the attorney for the Commonwealth as the defendant by his attorney; and by consent of the said defendant, the said attorney for the Commonwealth made an alteration in the said presentment of the grand jury; which presentment, as altered, is in the words following:

'VIRGINIA,

Fourth judicial district, twenty-first judicial circuit,
County of Henrico and city of Richmond, to wit:

'The grand jurors of the Commonwealth of Virginia, in and for the body of the county of Henrico and city of Richmond, duly summoned to attend the circuit superior court of law and chancery, for the county of Henrico and city of Richmond, for the trial of criminal causes, upon their oaths present James Phalen, for this, that he, the said James Phalen, since the first day of January, in the year eighteen hundred and thirty-seven, to wit, on the first day of June, in the year eighteen hundred and forty, at the city aforesaid, and within the jurisdiction aforesaid, unlawfully did sell, and cause to be sold, one certain lottery ticket, in a certain lottery to be drawn in this Commonwealth, to wit, in a lottery called Alexandria and Fauquier Turnpike Lottery, and then and there advertised to be drawn at , in the county of ; the said lottery not being a lottery authorized to be drawn by any contract made with this Commonwealth, prior to the twenty-fifth day of February, in the year eighteen hundred and thirty-four, or by any contract made since in pursuance of any law of this Commonwealth, passed prior to the said twenty-fifth day of February, eighteen hundred and thirty-four, the drawing of which lottery was not to extend by virtue of said last mentioned contract beyond the first day of January, 1840, contrary to the act of the assembly in that case made and provided. This presentment is made upon testimony of Charles Purcell and R. H. Maury, residents of the city of Richmond, witnesses called upon by the court, and sworn and sent by the court to give evidence to the grand jury.

A. PLEASANTS, *Foreman.*'"

Whereupon, came a jury, to wit: James M. Sublett, William F. Watson, Michael Howell, Calvin Green, Joseph Bigelow, John H.

Hilliard, William Nettles, George R. Gibbons, Philip Simon, William O. Trip, and Joel Torrence, who being elected, tried, and sworn, and John L. Clendinen, who being elected, tried, and charged, the truth to speak upon the issue joined, and having heard the evidence, upon their oath, and in solemn form, returned a special verdict, which, by consent as well of the attorney for the Commonwealth as the defendant by his attorney, is not to be entered in the order book of the court, but to be filed in the cause, and made a part of the record therein; which said special verdict is in the words and figures following:

"We the jury find the following facts, viz: that in consequence of a petition by the president and directors of the Alexandria and Fauquier *Railroad* Company, which is in the words and figures following, to wit:

NOVEMBER, 1828.

To the Legislature of Virginia:

Your petitioners, the subscribers, the president and directors of the Fauquier and Alexandria Turnpike Road, beg leave respectfully to call your attention to the same. This road runs into a fertile part of the State, consequently a great many are deeply interested in its improvement, as is manifest from the various petitions of a large number of the inhabitants of the counties of Fairfax, Prince William, and Fauquier, which have been laid before your honorable body for the last several years. To those petitions they respectfully refer, and will only add that this road is highly important to the public, and in which the State has an interest. The directors and a few of the stockholders, upon their own responsibility, have raised money, by which the road is now in excellent condition, except about three miles, which requires much repair. For this object, and for the repayment of the money borrowed, we ask your honorable body for a law authorizing a lottery to raise thirty thousand dollars; and as in duty bound will ever pray.

HUGH SMITH,
President of the Alexandria and Fauquier Turnpike Road.
WM. R. SMITH,
JACOB DOUGLASS,
JOHN LLOYD, *Directors.*

I do hereby certify, that the foregoing is a true copy of a petition presented to the House of Delegates of Virginia, on the sixth day of December, 1828. I further certify, that the said petition was referred to the committee of roads and internal navigation on the same day; that the committee reported the petition reasonable; that their report was concurred in by the House of Delegates on the 23d of December, and a bill was ordered to be brought in conformably therewith; that the bill was presented on the 24th of December, read the first time on the 26th, the second time on the 27th, and was passed on the third of January, 1829, by the House of Delegates; that the said bill passed the Senate on the 29th of January, with amendments; and that the said amend-

ments were concurred in, and the act became a law on the 30th January, 1829.

Given under my hand this seventh day of April, 1840.

(Signed) GEORGE W. MUNFORD,
C. H. D. and keeper of the rolls of Va.

That the Legislature of Virginia, on the 30th day of January, in the year 1829, passed a law in the following words, viz:

Be it enacted by the General Assembly, that Hugh Smith, Jacob Morgan, John Lloyd, William Dean, and Jacob Douglass, be, and hereby are, appointed commissioners, whose duty it shall be to superintend the raising, by way of lottery or lotteries, the sum of thirty thousand dollars, for the purpose of improving the Fauquier and Alexandria turnpike road.

Be it further enacted, that the said commissioners, or a majority of them, shall be, and they are hereby, authorized to contract and agree with some fit and proper persons for managing and conducting the said lottery or lotteries, demanding and taking bond with good security of such contractor or contractors, in such penalty as they may deem sufficient, payable to the governor or chief magistrate of this Commonwealth, and his successors in office, conditioned for the faithful performance of his or their contract in relation to the drawing of the said lottery or lotteries aforesaid, which bond the said commissioners shall file with the clerk of the county of Prince William or Fauquier; and any person or persons, body politic or corporate, aggrieved by a breach of the condition thereof, may, in the name of the governor or chief magistrate of this Commonwealth and his successors in office, at his or their own proper costs and charges, from time to time, sue for and recover on the said bond such damages as a jury may assess to such party so suing, and so from time to time suits may and shall be brought on the said bond until the whole of the penalty thereof shall have been sued against and paid by the *obligation* thereof.

And be it further enacted, that before the drawing of said lottery, or the sale of any tickets therein, the commissioners shall give bond and security, to be approved by the county court of Prince William or Fauquier, payable to the governor or chief magistrate of this Commonwealth for the time being, conditioned for the faithful application of the amounts which may come into their hands, or into the hands of any person or persons by them authorized to receive the same, in a penalty at least equal in amount to the whole sum by them contracted to be raised.

Be it further enacted, that the sum hereby authorized to be raised by the said lottery or lotteries, so soon as the whole or any part thereof shall be received by the said commissioners, shall be paid over to the president and directors of the said Fauquier and Alexandria Turnpike Road Company, and by them appropriated in the improvement and repair of said road. This act shall be in force from the passing thereof.

And on the 25th day of February, 1834, the said legislature passed another law, in the words and figures following, to wit, viz:

1. Be it enacted by the general assembly, that it shall not be lawful for any person or persons to draw, or cause to be drawn, any lottery or lotteries, or any scheme or schemes in any lottery, within this Commonwealth, after the first day of January, 1837; or to sell, or cause to be sold, any lottery ticket, or part of any lottery ticket, in any lottery to be drawn therein. And if any person or persons, after that day, set up or draw, or cause to be set up and drawn, at any place within the limits of this Commonwealth, any lottery whatsoever, every person concerned, directly or indirectly, as a manager or conductor of such lottery, shall be liable to a fine, at the discretion of a jury, of not less than one hundred, nor more than one thousand, dollars for each offence; and every person who shall be concerned, directly or indirectly, in setting up or drawing any lottery in any other character than as a manager or conductor thereof, shall be liable to a fine of not less than twenty, nor more than one hundred, dollars for each offence, at the discretion of a jury. And if any person shall, after the period aforesaid, sell any lottery ticket, or any part or share thereof, either in person or by proxy, or shall act as agent, attorney, or proxy, in making sale of any lottery ticket, or any part or share thereof, in any such lottery, he shall forfeit and pay, for every such *expense*, the sum of twenty dollars. And the said several penalties in this act provided shall be recovered by action of debt, presentment, indictment, or information, in any court of record having jurisdiction of the offence—one-half to the informer, or the person who may sue for the same, and the other half to the Commonwealth: Provided, that nothing herein contained shall be construed to extend to, or interfere with, contracts already made for the drawing of any lottery or lotteries, the drawing whereof, by the provisions of such contracts, shall extend to a period beyond the said first day of January, 1837: And provided, also, that nothing herein contained shall be construed to extend to, or interfere with, any contract which may hereafter be made, under and by virtue of any existing law authorizing the same, for the drawing of any lottery, the drawing whereof shall not extend beyond the first day of January, 1840.

2. This act shall be regularly given in charge, by the several courts of this Commonwealth, to the grand juries sworn in such courts respectively.

3. This act shall be in force from the 1st day of January, 1837.

And on the 11th day of March, in the year 1834, another law, in the words and figures following to wit, *viz:*

Be it enacted by the general assembly, that William L. Hodgson and Bernard Hooe be, and they are hereby, appointed commissioners, instead of Hugh Smith and John Lloyd, resigned, to carry into effect the act passed on the 30th day of January, 1829, "to authorize the raising, by way of lottery, a sum of money for improving the Fauquier and Alexandria Turnpike road."

2. Be it further enacted, that whenever any vacancy or vacancies shall hereafter occur in the commissioners appointed for the purpose aforesaid, by death, resignation, or refusal to act, the same shall be filled by the executive of this Commonwealth.

3. This act shall be in force from its passage.

That the Fauquier and Alexandria Turnpike Company, relying upon the benefit and advantages of the act of January, 1829, did, prior to the 25th day of February, 1834, enter into contracts and incur debts for the erection and completion of their road, expecting and intending to raise, for the payment thereof, by a lottery, the money authorized by the said act of 1829. It is also agreed that the commissioners of the said company did, under the said act of 1829, and March 11th, 1834, for the purposes specified in the said act, enter, on the 19th day of December, in the year 1839, into a contract with James Phalen and Francis Morris, which is in the words and figures following, to wit, *viz:*

Articles of agreement made this 19th day of December, in the year one thousand eight hundred and thirty-nine, between Jacob Morgan, of Jefferson county, in the State of Virginia, William Dean, of Alexandria, in the District of Columbia, and Jacob Douglass, of Fauquier county, in the State of Virginia, acting as commissioners under an act of the general assembly of the said State, hereinafter mentioned, of the first part, and James Phalen and Francis Morris, of the city of New York, of the second part:

Whereas, by an act of the General Assembly of the State of Virginia, passed the 30th day of January, 1829, entitled "An act to authorize the raising, by way of lottery, a sum of money for improving the Fauquier and Alexandria turnpike road," full power and authority is given to raise, by a lottery or lotteries, the sum of thirty thousand dollars, for the purpose in the said act set forth; and the parties of the first part, with Hugh Smith and John Loyd, were appointed commissioners, whose duty it was declared to be, to superintend the raising, by way of lottery or lotteries, the said sum of thirty thousand dollars, for the purpose of improving the Fauquier and Alexandria turnpike road; and the said commissioners, or a majority of them, were authorized to contract and agree, with some fit and proper person or persons, for the managing and conducting the said lottery or lotteries, demanding and taking bond, with good security, of such contractor or contractors, in such penalty as they might deem sufficient, payable to the Governor or chief magistrate of the said State and his successors in office, conditioned for the faithful performance of his or their contract in relation to the drawing of said lottery or lotteries. And whereas, the parties of the first part, being a majority of the commissioners appointed as aforesaid, have contracted with the parties of the second part for drawing the lottery and lotteries authorized by the said act: Now this indenture witnesses, that, in consideration of the sums of money hereinafter agreed to be paid by the parties of the second part to the parties of the first part, the said parties of the first part do hereby appoint the said parties of the second part the

sole and exclusive managers and conductors of the lotteries aforesaid, and hereby do covenant and agree that this appointment shall not be revoked by them, or any of them, and that the sole and exclusive right of drawing the said lottery or lotteries, so far as the parties of the first part are, by the law aforesaid, authorized to contract for the same, shall be and remain vested in the parties of the second part, until the payments hereinafter stipulated to be made by the said parties of the second part shall have amounted to the said sum of thirty thousand dollars, authorized to be raised by the said act—to be used and exercised by the parties of the second part, by drawing so many lotteries as they may think proper, under such scheme or schemes as they may devise. And the parties of the second part do hereby agree to take on themselves the management of the lottery and lotteries aforesaid, and to pay to the parties of the first part, as the consideration of this contract or agency, the sum of fifteen hundred dollars per annum, to be computed from the 2d day of this month, and in that proportion for any part of a year; and they do further agree, that if, during the present session of the General Assembly of Virginia, an act shall be procured exempting the lottery and lotteries authorized by the act before mentioned from the operation of the act of said General Assembly passed the 25th day of February, 1834, entitled "An act to suppress lotteries in this Commonwealth," they, the said parties of the second part, will pay to the parties of the first part an additional compensation, at the rate of one thousand dollars per annum, the payment of the said additional sum to date from the passage of such act.

And whereas, the constitutionality of the said act, passed the 25th day of February, 1834, has been doubted, the parties of the second part do further agree with the parties of the first part, that if, during the present session of the General Assembly of Virginia, no act shall be passed exempting the lotteries authorized by the act of 1829, before mentioned, from the operation of the said act of 1834, they will, at their own proper expense, use all ways and means which may be expedient and necessary to have settled and determined the constitutionality of the said last mentioned act, and that they will, by appeal, or in such other way as shall be legal and necessary, obtain on this point the sentence, judgment, or decree, of the highest legal tribunals of the State of Virginia, and of the United States, to which the question can be taken.

And the parties of the second part do further agree with the parties of the first part, that if, before a final decision of the said question shall be obtained, and after the end of the present session of the General Assembly of Virginia, an act of that Assembly shall be procured suspending the operation of the act of 1834, in regard to the lottery and lotteries aforesaid, they, the parties of the second part, will, in lieu of the payment before provided, pay to the parties of the first part, during the period of such suspension, the sum of two thousand dollars per annum, and at that rate for any portion of a year, to date from passing of such act, to which time the payments before agreed on are to be made; and

that, if no such suspension can be procured, and the parties of the second part shall succeed in establishing the unconstitutionality of the said act of 1834, then, from the time it shall be so established, they will pay to the parties of the first part, in lieu and in discharge of the payments before agreed on, from that time, the sum of fifteen hundred dollars per annum, and at that rate for any part of a year. And it is further agreed on, that all the payments before agreed on shall be made half-yearly. It is hereby provided and distinctly understood, that the payments aforesaid, and all rights and powers of the parties of the second part to continue to act or draw any lottery or lotteries under this contract, are to cease as soon as, from the payments to be made under the foregoing provisions, the parties of the first part shall have received the said sum of thirty thousand dollars. And it is further provided, that if, by any legal proceedings, the parties of the second part shall be prevented from drawing the lottery or lotteries aforesaid, then the payments before stipulated to be made by them shall, during the time they shall be so prevented, cease and determine; and their liability to make any such payments thereof shall only recommence on the decision of the highest judicial tribunal to which the question can be taken that the act of 1834, before mentioned, is unconstitutional, or on the removal of such legal impediments.

And the parties of the second part do further agree with the parties of the first part that they, the parties of the second part, will satisfy and pay all charges and expenses which shall be incurred in drawing the said lottery or lotteries, and will, at the expiration of forty days after each and every drawing, pay all prizes that may be drawn therein, subject to a deduction of fifteen per cent., if demanded within twelve months after such drawing; which fifteen per cent. and all outlawed prizes, and the sums of money to be received from the sale of tickets, are to belong to the parties of the second part, and to be held and retained by them for their own proper use.

And the parties of the second part do further agree with the parties of the first part that they will, before they proceed to sell any tickets in any lottery under the authority of this agreement, execute and deliver their bond, with two securities, to be approved of by the parties of the first part, their bond to be made to the Governor of Virginia and his successors in office, in the penalty of one hundred thousand dollars, conditioned for the faithful performance of this contract.

In witness whereof, the parties to this agreement have hereto set their hands and seals, the day and year first before written.

(Signed,) JACOB MORGAN, [L. S.]
WM. DEAN, [L. S.]
JACOB DOUGLASS, [L. S.]
JAMES PHALEN, [L. S.]
F. MORRIS. [L. S.]

Sealed and delivered in the presence of
S. M. STITENUS, to
R. I. TAYLOR, to W. D. and J. D.

The said company having, on its part, complied with the requisitions of the said acts of January, 1829, and March, 1834.

"And that the defendant, James Phalen was at the time of this presentment, one of the managers of this lottery authorized by the said acts of 1829, and March, 1834, and is the same James Phalen who is a party to the said contract; and under the said acts, and by virtue of the said contract, acting for the said James Phalen and Francis Morris, sold the ticket in the presentment mentioned at the city of Richmond, and within the jurisdiction of this court; and that the said lottery was to be drawn in the Commonwealth of Virginia.

"If upon the foregoing state facts, the law be for the Commonwealth, then we find the defendant guilty; but if the law be for the defendant, then we find the defendant not guilty.

WM. F. WATSON."

And thereupon, the matters of law arising upon the said special verdict being argued, it seems to the court that the law is for the Commonwealth. Therefore, it is considered that the defendant, for the offence in the presentment aforesaid mentioned, forfeit and pay to the Commonwealth twenty dollars, and that he pay the costs of this prosecution.

A copy. Test: J. ROBINSON, *C. C.*

"I, Philip N. Nicholas, judge of the superiort court of law and chancery for the county of Henrico and city of Richmond, on the common law side, do hereby certify, that the preceding is a full and correct copy of the proceedings in the case of the Commonwealth against James Phalen, lately depending in that court.

"Certified under my hand and seal, in pursuance of the writ of error awarded by the general court, and hereto annexed, this 14th day of January, 1842. P. N. NICHOLAS. [SEAL.]

And at another day, to wit, at a general court of Virginia continued by adjournment, and held at the Capitol in the said city of Richmond, on Saturday the eleventh day of December, in the year 1841, for reasons appearing to the court, it was ordered, that this cause be continued until the then next term.

And now, at this day, to wit, at a general court of Virginia continued by adjournment, and held at the Capitol, in the said city of Richmond, on the day and in the year first herein mentioned, to wit, on Saturday, the second day of July, in the year one thousand eight hundred and forty-two, came as well the plaintiff in error, by his attorney, as the attorney general, on behalf of the Commonwealth, who agrees to receive the errors set forth in the plaintiff's petition, instead of a formal assignment of errors; and thereto he pleaded that there is no error in the record of the judgment of the said circuit superior court; to which the plaintiff replied, that there is error in the said record in manner and form as in his assignment he hath set forth. And thereupon, the transcript of the record of the judgment aforesaid being seen and inspected, and due consideration had thereof, it seems to the court here that

there is no error in the said judgment. Therefore, it is considered by the court that the said judgment be affirmed, and that the Commonwealth recover against the said James Phalen her costs about her defence in this court expended; which is ordered to be certified to the said circuit superior court, on the common law side thereof.

The foregoing is a true and complete copy of the record in the case of James Phalen against the Commonwealth, lately depending in the general court of Virginia; except that the transcript of the record and proceedings in the circuit court, which was annexed to the petition of the said James Phalen for the writ of error, has not been inserted. The insertion was deemed useless because the transcript certified on the return of the writ of error (and which is copied above) is verbatim the same with that which has been omitted.

Given under my hand this eighth day of July, 1842.

N. P. HOWARD,
Clerk of the General Court of Va.

Filed 24th January, 1843.

VIRGINIA, *to wit:*

I, Nathaniel P. Howard, clerk of the general court of Virginia, do certify, that the matter contained in the foregoing printed pages, beginning on the printed page numbered 4, with the words "pleas at the capitol in the city of Richmond," and continuing thence, without interruption, to the words on the printed page numbered 16, which is "ordered to be certified to the said circuit superior court, on the common law side thereof," and including the last mentioned words, constitutes (as the same has been corrected with the pen in the pages numbered 7, 9, and 15,) a true and complete copy of the records in the case of James Phalen, against the Commonwealth of Virginia, lately depending in the said general court; except that the transcript of the record and proceedings in the circuit court, which was annexed to the petition of the said James Phalen, for the writ of error, and which is verbatim the same with the transcript certified on the return of the said writ, has not been inserted.

In testimony whereof I have hereto signed my name, and affixed the seal of the said general court, at the Capitol, in the city of
[SEAL.] Richmond, this seventh day of July, in the year one thousand eight hundred and forty-six.

N. P. HOWARD.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of
[SEAL.] the general court of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said general court of Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Phalen, plaintiff in error, and the Commonwealth of Virginia, defendant in error, wherein was drawn in question the validity of a

treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty of, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said James Phalen, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and forty-five.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by— R. B. TANEY.

The United States of America, to the Commonwealth of Virginia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the general court of Virginia, wherein James Phalen is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-first day of February, in the year of our Lord one thousand eight hundred and forty-six.

R. B. TANEY.

On this 7th day of July, in the year of our Lord one thousand eight hundred and forty-six, personally appeared Robert C. Stanard, of *of* lawful age, before me, the subscriber, one of the associate judges of the Supreme Court of the United States, and makes oath that he delivered